

No. 20-410

**In The
Supreme Court of the United States**

NTCH, INC.,

Petitioner,

v.

**FEDERAL COMMUNICATIONS COMMISSION,
THE UNITED STATES OF AMERICA,
AND DISH NETWORK CORPORATION,**

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Jennifer B. Tatel
Counsel of Record
Bryan N. Tramont
J. Wade Lindsay
WILKINSON BARKER
KNAUER, LLP
1800 M Street, NW
Suite 800N
Washington, DC 20036
(202) 783-4141
jtatel@wbklaw.com

Jeffrey H. Blum
DISH NETWORK CORP.
1110 Vermont Avenue, NW
Suite 450
Washington, DC 20005

Counsel for Respondent

DISH Network Corporation Dated: November 30, 2020

QUESTION PRESENTED

Whether the D.C. Circuit correctly applied settled jurisprudence under the Administrative Procedure Act when it concluded that the Commission acted lawfully in finding that NTCH's Application for Review failed to satisfy section 1.115(b)(2) of the Commission's procedural rules.

PARTIES TO THE PROCEEDING

Petitioner in 20-410 is NTCH, Inc. (hereinafter “NTCH”). Respondents in 20-410 are the Federal Communications Commission (“Commission” or “FCC”), the United States of America, and DISH Network Corporation (hereinafter “DISH”).

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to this Court’s Rule 29.6, undersigned counsel states that DISH is the parent of DISH DBS Corporation, a corporation with publicly traded debt. DISH DBS Corporation is a wholly owned subsidiary of DISH Orbital Corporation. DISH Orbital Corporation is a wholly owned subsidiary of DISH Network Corporation, a corporation with publicly traded equity (NASDAQ:DISH). Based solely on a review of Form 13D and Form 13G filings with the Securities and Exchange Commission, no entity owns more than 10% of DISH Network Corporation’s stock other than Dodge & Cox and Telluray Holdings, LLC.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE PETITION	6
I. THE PETITION PRESENTS NO CIRCUIT SPLIT OR OTHER COMPELLING REASON FOR GRANTING CERTIORARI	6
II. THE COMMISSION AND THE D.C. CIRCUIT PROPERLY APPLIED SETTLED LAW TO NTCH’S APPLICATION FOR REVIEW	7
A. The Commission Properly Applied 47 C.F.R. § 1.115(b)(2).....	7
B. The D.C. Circuit Properly Applied the APA’s Standard of Review.....	9
CONCLUSION	10

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>Bartholdi Cable Co., Inc. v. FCC</i> , 114 F.3d 274 (D.C. Cir. 1997)	9
<i>BDPCS, Inc. v. FCC</i> , 351 F.3d 1177 (D.C. Cir. 2003)	7
<i>Cellco P'ship v. FCC</i> , 700 F.3d 534 (D.C. Cir. 2012)	7
<i>Home Box Office, Inc. v. FCC</i> , 567 F.2d 9 (D.C. Cir. 1977)	9
<i>Motor Vehicle Mfrs. Ass'n v.</i> <i>State Farm Mut. Automobile Ins. Co.</i> , 463 U.S. 29 (1983)	10
<i>NLRB v. Pittsburgh S.S. Co.</i> , 340 U.S. 498 (1951)	6
<i>NTCH, Inc. v. FCC</i> , 950 F.3d 871 (D.C. Cir. 2020)	5, 8, 9
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974)	6
 REGULATIONS	
47 C.F.R. § 1.115(b)	5

47 C.F.R. § 1.115(b)(2)	5, 6, 7, 8
-------------------------------	------------

OTHER AUTHORITIES

<i>Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands; Comment Sought on Competitive Bidding Procedures for Auction 96</i> , Public Notice, 28 FCC Rcd 10013 (2013)	1, 2
--	------

<i>Auction of H Block Licenses in the 1915-1920 MHz and the 1995-2000 MHz Bands</i> , Public Notice, 28 FCC Rcd 13019, 13063-64 (2013)	2, 3, 4
---	---------

<i>Dish Network Corp.</i> , Memorandum Opinion and Order, 28 FCC Rcd 16787 (WTB 2013).....	<i>passim</i>
---	---------------

<i>DISH Network Corporation</i> , Memorandum Opinion and Order, 33 FCC Rcd 8456 (2018)	5, 8
---	------

<i>NTCH, Inc.</i> , Memorandum Opinion and Order, 28 FCC Rcd 16108 (WTB 2013)	4
--	---

<i>Wireless Telecommunications Bureau Opens Docket To Seek Comment on DISH Network Corporation's Petition for Waiver and Request for Extension of Time</i> , Public Notice, 28 FCC Rcd 12987 (WTB 2013)	3
--	---

COUNTERSTATEMENT OF THE CASE

NTCH's petition for certiorari ("Petition") hinges on the erroneous narrative that the FCC improperly adopted certain policy outcomes based on an alleged "backroom" agreement with DISH to provide the FCC with private funding for the agency's public interest objectives. *See* Petition at 2. This narrative is false. In 2013, the FCC was considering a range of interrelated issues regarding spectrum bands in which DISH held a unique interest. DISH publicly proposed an approach that would advance the public interest with respect to those various issues. The FCC conducted a careful review of the record in connection with each issue, ultimately adopted many of DISH's proposals after finding they promoted the public interest, and issued public orders explaining its reasoning. Both the Commission's justifications and its process easily satisfied the demands of the Administrative Procedure Act ("APA") and the Commission's rules.

Pursuant to the Middle Class Tax Relief and Job Creation Act of 2012 (the "Spectrum Act"), Congress directed the Commission to allocate a block of spectrum – referred to as the "H Block" – for commercial use and for licensing through competitive bidding. *See Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands; Comment Sought on Competitive Bidding Procedures for Auction 96*, Public Notice, 28 FCC Rcd 10013 (2013). The Spectrum Act directed that proceeds from the H Block auction be deposited into the Public Safety Trust Fund and be used, in part, to fund a nationwide, interoperable public safety broadband network operated by the First Responder Network Authority. *Id.*

at 10026 ¶ 52. This auction was designated “Auction 96.”

The Commission’s Wireless Telecommunications Bureau (“Bureau”) announced that it would hold Auction 96 to allocate 176 licenses in the H Block. *See id.* at 10014 ¶ 3. The Bureau sought public comment on whether it should “establish a reserve price” for the auction, below which the spectrum would not be sold. *Id.* at 10026 ¶ 52. The Bureau proposed to set that reserve price based “on the aggregate of the gross bids for the H Block licenses, rather than license-by-license.” *Id.* Commenters generally agreed with the Bureau’s proposal, though none suggested a specific aggregate reserve price.

On September 9, 2013, DISH filed a letter proposing that the FCC set an aggregate reserve price of at least \$0.50 per megahertz of bandwidth per population (“MHz-POP”). *See Auction of H Block Licenses in the 1915-1920 MHz and the 1995-2000 MHz Bands*, Public Notice, 28 FCC Rcd 13019, 13063-64 ¶ 170 (2013) (“*Auction 96 PN*”).¹ DISH derived its proposal from private sales and Commission auctions of similar spectrum, and referenced reports in its filing from financial institutions valuing the H Block between \$0.62 and \$1 per MHz-POP. *Id.* at 13064 n.235.

That same day, DISH also filed a petition asking the Bureau to waive some of the restrictions on its existing AWS-4 licenses adjacent to the H Block. *See Dish Network Corp.*, Memorandum Opinion and Order, 28 FCC Rcd 16787 (WTB 2013) (“*2013 DISH*”).

¹ MHz-POP is a unit equal to the number of megahertz multiplied by the population of a region.

Waiver Order”). Specifically, DISH sought the option to use the lower AWS-4 Band for downlink operations (rather than uplink operations, as was required under the Commission’s rules). *See id.* The waiver would allow DISH to harmonize its uses of the H Block, should it win any of those licenses in Auction 96, and the AWS-4 Band. DISH also committed to bid at least an aggregate nationwide reserve price in the upcoming Auction 96 (not to exceed \$0.50 per MHz-POP) if the Bureau granted the waivers. *Id.* DISH also requested a one-year extension of the seven-year final construction deadline to offer terrestrial service in the AWS-4 Band. *Id.*

On September 13, 2013, the Bureau issued a public notice seeking comment on DISH’s waiver petition. *See Wireless Telecommunications Bureau Opens Docket To Seek Comment on DISH Network Corporation’s Petition for Waiver and Request for Extension of Time*, Public Notice, 28 FCC Rcd 12987 (WTB 2013). Also on September 13, the Bureau separately announced the procedures for the H Block auction and set an aggregate reserve price of \$1.564 billion consistent with DISH’s proposed valuation. *See Auction 96 PN*, 28 FCC Rcd at 13064 ¶ 172.

NTCH opposed both actions. On September 30, 2013, it filed an objection to DISH’s waiver petition, arguing, among other things, that DISH and the Commission had made a secret bargain that amounted to a cash-for-waiver quid pro quo. *See 2013 DISH Waiver Order*, 28 FCC Rcd at 16808-09 ¶ 53. On October 18, NTCH petitioned for reconsideration of the *Auction 96 PN*, on the grounds that the reserve price was too high and was the consequence of the improper

deal. *See NTCH, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16108 (WTB 2013) (“*Auction 96 Reconsideration Order*”).

During the pendency of DISH’s waiver petition and NTCH’s petition for reconsideration of the *Auction 96 PN*, NTCH did not apply to, or participate in, Auction 96.

On November 27, 2013, the Bureau denied NTCH’s petition for reconsideration of the *Auction 96 PN*. The Bureau concluded that NTCH offered no reason to lower the reserve price. As to NTCH’s allegations of a “backroom” deal, the Bureau refuted such claims, finding that any so-called “arrangement” had been disclosed and subject to public comment in connection with DISH’s waiver petition. *See id.* at 16112-13 ¶¶ 13-17. NTCH filed an application for review of the *Auction 96 Reconsideration Order* on December 27, 2013.

On December 20, 2013, the Bureau granted DISH’s waiver petition. *See 2013 DISH Waiver Order*, 28 FCC Rcd at 16787. The Bureau again denied any inappropriate “deal” with DISH, pointing out that its decision was “based on the public record.” *Id.* at 16808-09 ¶ 53. The Bureau further concluded that DISH’s public “commitment to ensure that the H Block auction satisfies the aggregate reserve price” was an “additional public interest benefit.” *Id.* NTCH filed an application for review of the *2013 DISH Waiver Order* on January 20, 2014.

On August 16, 2018, the Commission denied NTCH’s application for review of the *Auction 96 Reconsideration Order*. *See NTCH, Inc.*, Memorandum

Opinion and Order, 33 FCC Rcd 8446 (2018) (“*2018 Auction 96 Review Order*”). The Commission dismissed NTCH’s application because it failed to delineate the Bureau’s errors “with specificity,” as required by section 1.115(b)(2) of the Commission’s rules. *Id.* at 8450-51 ¶ 11; *see* 47 C.F.R. § 1.115(b). Alternatively, the Commission rejected NTCH’s various arguments on the merits. *2018 Auction 96 Review Order*, 33 FCC Rcd at 8451-54 ¶¶ 12-18.

On the same day, the Commission denied NTCH’s application for review of the *2013 DISH Waiver Order*. *See DISH Network Corporation*, Memorandum Opinion and Order, 33 FCC Rcd 8456 (2018) (“*2018 DISH Waiver Order*”). The Commission dismissed NTCH’s application for review because NTCH lacked administrative standing.

NTCH appealed these matters to the D.C. Circuit, which upheld the *2018 Auction 96 Review Order*, confirming that NTCH’s application for review was properly dismissed for failure to comply with 47 C.F.R. § 1.115(b)(2). *NTCH, Inc. v. FCC*, 950 F.3d 871 (D.C. Cir. 2020). The D.C. Circuit remanded NTCH’s challenges to the *2013 DISH Waiver Order* and *2018 DISH Waiver Order* for the Commission to consider the merits of NTCH’s claims. *Id.*

REASONS FOR DENYING THE PETITION

I. THE PETITION PRESENTS NO CIRCUIT SPLIT OR OTHER COMPELLING REASON FOR GRANTING CERTIORARI

In seeking certiorari, NTCH does not contend the D.C. Circuit's decision conflicts with the decision of another court of appeals. Nor does it claim the D.C. Circuit decided an important federal question in a way that conflicts with a decision by a state court of last resort, or seriously departed from the accepted and usual course of judicial proceedings. NTCH also does not argue the D.C. Circuit decided an important, but unsettled, question of federal law. Instead, NTCH asks this Court to correct the D.C. Circuit's supposed misapplication of a properly stated rule of law, namely the FCC's standards for dismissing applications for review for failure to meet the procedural requirements of 47 C.F.R. § 1.115(b)(2).

Because the Petition seeks review only on the ground that the lower court misapplied the law to the facts, or misperceived the facts, there is no compelling basis for Supreme Court review. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) (explaining that the Supreme Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.") This

is particularly the case here because the Commission has yet to rule on the merits of NTCH's challenges to the *2013 DISH Waiver Order* and *2018 DISH Waiver Order*. In addition, the Commission and the D.C. Circuit properly applied settled law to dismiss NTCH's application for review of the *2018 Auction 96 Review Order*.

II. THE COMMISSION AND THE D.C. CIRCUIT PROPERLY APPLIED SETTLED LAW TO NTCH'S APPLICATION FOR REVIEW

The D.C. Circuit properly applied its settled jurisprudence under the APA as articulated in *Cellco P'ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012), and *BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003), concluding that the Commission acted lawfully in dismissing NTCH's application for review for failure to comply with section 1.115(b)(2) of the Commission's procedural rules. 47 C.F.R. § 1.115(b)(2). Indeed, there was no reversible error either in the Commission's dismissal of NTCH's application for review or the D.C. Circuit's decision upholding the Commission.

A. The Commission Properly Applied 47 C.F.R. § 1.115(b)(2).

NTCH argues that the Commission should not have dismissed its application for review (from the Bureau to the full Commission) under section 1.115(b)(2) of the Commission's rules. *See* Petition at 18-19. Section 1.115(b)(2) of the Commission's rules requires that an application for review must "specify with particularity" why—selecting from five factors—

an order by one of the agency's Bureaus warrants review by the full Commission. *See* 47 C.F.R. § 1.115(b)(2). As the Commission properly concluded, NTCH did not meet this burden.

NTCH's application for review attempted to meet this requirement, alleging that the Bureau erred in three ways: (1) the reserve price was set "contrary to precedent" and was "unsupported by the facts of record," (2) "adopting a reserve price based on a deal with a potential auction bidder [wa]s unprecedented," and (3) the Bureau's action "constitute[d] a prejudicial procedural error." Petition at App. 72. These unsupported statements, however, were insufficient to meet the requirements of 47 C.F.R. § 1.115(b)(2). NTCH did not identify any "statute, regulation, case precedent, or established Commission policy (or any evidence of record)" undermining the Bureau's decision. *2018 Auction 96 Review Order*, 33 FCC Rcd at 8450-51 ¶ 11. Nor did it identify any "concrete harm or prejudice it may have suffered" from the alleged procedural error, as NTCH voluntarily chose not to participate in Auction 96. *Id.* Put simply, "NTCH alleged 'unprecedented' action and 'prejudicial' error without citing precedent or showing prejudice." *NTCH, Inc. v. FCC*, 950 F.3d at 885.

NTCH's response that its procedural errors were "minor" technicalities because the substance of its application for review was "determinable from the body of the pleading" is insufficient to rescue its application for review. Petition at 18-19. Whether the Commission could have inferred the substance of NTCH's alleged errors from the body of the pleading is immaterial. "[T]he Commission 'need not sift pleadings and documents to identify arguments that

are not stated with clarity.” *NTCH v. FCC*, 950 F.3d at 885 (quoting *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997)) (internal quotation marks omitted). The Commission therefore correctly dismissed the application for review.

B. The D.C. Circuit Properly Applied the APA’s Standard of Review.

Citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54-55 (D.C. Cir. 1977), NTCH argues that the Commission’s judgment was not entitled to deference given the “highly *irregular* circumstances here.” Petition at 17-18 (emphasis in original). NTCH misstates the record in asserting that there was a “covert deal favoring a single auction bidder,” namely DISH. *Id.* at 17.

There was no “backroom” deal as NTCH alleges. Indeed, NTCH’s theory of a secret proposal lacks credibility because NTCH itself filed comments on DISH’s proposal in the relevant public FCC proceeding. *See supra* text at 4-5.

In any event, neither DISH nor the Commission concealed the details of DISH’s proposals as NTCH alleges. DISH presented its proposals publicly, in the record of the appropriate administrative proceedings. *See supra* text at 3-4. The Commission assessed these filings based on an evidentiary record developed through normal processes – including the solicitation of public comment on DISH’s proposal in the context of the waiver petition – in which interested parties had an opportunity to participate and comment. The FCC conducted a careful review of the

record in connection with the issues raised by DISH's proposals, found that many of the proposals served the public interest, and explained how. *See supra* text at 5, citing *2013 DISH Waiver Order*, 28 FCC Rcd at 16787, and *Auction 96 Reconsideration Order*, 28 FCC Rcd at 16112-13 ¶¶ 13-17. As the D.C. Circuit properly concluded, this is all the FCC was required to do. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

DISH NETWORK CORP.

By: /s/ Jennifer B. Tatel
JENNIFER B. TATEL
Counsel of Record

JEFFREY H. BLUM	BRYAN N. TRAMONT
DISH NETWORK CORP.	J. WADE LINDSAY
1110 Vermont Avenue NW	WILKINSON BARKER
Suite 450	KNAUER, LLP
Washington, DC 20005	1800 M Street, NW
	Suite 800N
	Washington, DC 20036
	(202) 783-4141
	jtatel@wbklaw.com

November 30, 2020